

Casey's Enterprises, LLC
d/b/a Casey's General Store #1864
3266 North 25th Street
Terre Haute, Indiana 47804

Permit No. DL84-20757
District 5

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

BACKGROUND OF THE CASE

The Permittee, Casey's Enterprises, LLC, d/b/a Casey's General Store #1864, 3266 North 25th Street, Terre Haute, Indiana 47804 (Permittee) is the applicant for an Alcohol and Tobacco Commission (ATC) type 115 permit, #DL84-20757. The Permittee filed its application on or about November 3, 2003. The application was assigned to the Vigo County Local Alcoholic Beverage Board (LB) for hearing. The LB heard the application request on February 17, 2004 and on that same date, voted 3 – 0 to deny the application. The ATC adopted the recommendation of the LB on March 3, 2004, and denied the request for the permit.

The Permittee filed a timely notice of appeal and the matter was set for an appeal hearing before ATC Hearing Judge, Mark C. Webb (HJ). The HJ set the matter for hearing on June 17, 2004, and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The Permittee was represented by Chris W. Cotterill, Barnes & Thornburg, LLP. There were no remonstrators of record in this matter. The HJ took judicial and administrative notice of the entire file in this matter and now submits these Proposed Findings of Fact and Conclusions of Law to the ATC for consideration.

II.

EVIDENCE BEFORE THE LOCAL BOARD¹

A. The following individuals testified before the LB in favor of the Permittee in this cause:

1. George R. Belt, District Manager, Casey's Enterprises. There are several other Casey's stores operating in the State of Indiana. The company has had no violations with regard to sales to minors. Casey's has extensive protections and

¹ The quality of the recording of the LB hearing in this matter is extremely poor. However, if one listens to the tape enough times, one can essentially understand the proceedings sufficient to know what evidence was presented before the board, and, the poor quality of the LB tape here notwithstanding, this HJ is able to undertake review of this matter on the merits. Nonetheless, LBs are continually reminded to make every effort to have as clear a recording of the hearing as possible, as this greatly aids in both administrative and judicial review of the matter.

procedures in place to minimize the risk of sales of alcohol to minors. The company has a training program and devotes significant effort to ensure that its clerks do not sell alcoholic beverages to minors. Casey's offers convenience to its customers because they can purchase alcoholic beverages while picking up other grocery items such as bread, butter, and/or eggs.

- B. The following individuals testified before the LB in favor of the remonstrators and against the Permittee in this cause:
1. Richard Lee, owner of Heritage Liquor, 108 Glendale, Terre Haute, Indiana. He opposed the permit request stating that the community does not need another store that sells alcoholic beverages.
 2. Wayne R. Bowen, owner of 7th & 70 Liquor, 3334 S. 5th Street, Terre Haute, Indiana. He opposed the permit request stating that the community does not need another store that sells alcoholic beverages.
- C. Comments by the LB:
1. At the hearing, LB member inquired about separating beer and wine from other items in the store on Sundays to prevent minors from stealing and/or consuming alcoholic beverages.
- D. The following exhibits were introduced before the LB in favor of the Permittee: None.
- E. The following exhibits were introduced before the LB in favor of the remonstrators and against the Permittee: None.

III. EVIDENCE BEFORE THE ATC

- A. The following individuals testified before the ATC in favor of the Permittee in this cause:
1. George R. Belt, District Manager, Casey's Enterprises. There are number of other Casey's stores operating in Indiana. Casey's is a chain of stores and each one is identical to all others with respect to layout and inventory. Casey's sells groceries, prepared food items, and other miscellaneous items. Casey's makes its own pizza and deli sandwiches in each store. The sale of these goods constitutes about forty (40) to forty-five (45) percent of the income at each store. Casey's operates other stores in Indiana that sell alcoholic beverages, none of which have been cited for sales to minors. Casey's devotes great effort to avoid the sale of alcoholic beverages to minors. Casey's has extensive protections and procedures in place to minimize or eliminate the risk of sales of alcohol to minors. Beer is

only sold by the case, making it difficult to steal beer from the premises. Casey's is located in a commercial area and is not within 200 feet of a school or church.

- B. The following exhibits were introduced before the ATC in favor of the Permittee in this cause: None.
- C. The following individuals testified before the ATC in favor of the remonstrators and against the Permittee in this cause: None.
- D. The following exhibits were introduced before the ATC in favor of the remonstrators and against the Permittee in this cause: None.

IV. FINDINGS OF FACT

- 1. The Permittee, Casey's Enterprises, LLC, d/b/a Casey's General Store #1864, 3266 North 25th Street, Terre Haute, Indiana 47804 (Permittee) is the applicant for a type 115 Alcohol and Tobacco Commission (ATC) permit, #DL84-20757. (ATC File).
- 2. Each store sells grocery items, prepared food items such as pizzas, sandwiches and cookies, and other items. (ATC Hearing).
- 3. The sales from these items are substantial with respect to each store. (ATC Hearing).
- 4. The Commission has determined that numerous other Casey's General Stores identical to the instant store are "grocery stores" pursuant to Indiana law. (ATC Records).
- 5. Casey's is of good moral character and good repute within the city of Terre Haute and the State of Indiana. (ATC Hearing).
- 6. No objections made by the remonstrators were directed in any way at the personal conduct of the Permittee, Casey's Enterprises, LLC. (LB Hearing).
- 7. Remonstrators submitted no evidence regarding the detriment that they claim would result if Casey's were granted a permit in either case. (LB Hearing; ATC Hearing).
- 8. Casey's employees are extensively trained to avoid problems regarding the sale of alcoholic beverages to minors. (ATC Hearing).
- 9. Competition between Casey's and the existing package liquor stores played a role in the remonstrance in this case. (LB Hearing; ATC Hearing).

10. The permit at issue is being placed in a commercial location and is not being placed in a residential area. (ATC Hearing).
11. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

V.
CONCLUSIONS OF LAW

1. The Permittee, Casey's Enterprises, LLC, d/b/a Casey's General Store #1864, 3266 North 25th Street, Terre Haute, Indiana 47804 (Permittee) filed its application for a type 115 permit, # DL84-20757. (ATC Files).
2. The Permittee is not disqualified from holding an ATC permit pursuant to IC 7.1-3-4-2. (ATC Files).
3. The Permittee is a grocery store and thus qualified to hold a grocery permit. IC 7.1-3-5-2.
4. The ATC may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. 905 IAC 1-27-4.
5. Where a Permittee shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).
6. Where a Permittee shows that competing stores located in close proximity to the proposed permit premises are selling alcohol, such evidence constitutes a desire to purchase the product. *Id.*
7. The LB should not deny a permit to an otherwise qualified permittee based solely on evidence submitted by a competing permittee. *Wine & Spirits Wholesalers of Indiana, Inc. v. Indiana Alcoholic Beverage Commission*, 556 N.E.2d 17 (Ind. Ct. App. 1990), *trans. denied*.
8. As would-be competitors of Casey's, Mr. Lee and Mr. Bowen have no standing before this Commission. *Id.* As such, there were no remonstrators of record.
9. Even if Mr. Lee and Mr. Bowen were to be accorded standing, they clearly have a bias in favor of minimizing competition to the package liquor store industry. *Standifer v. State*, 718 N.E.2d 1107, 1110 (Ind. 1999) (quoting *Pfefferkorn v. State*, 413 N.E.2d 1088, 1089 (Ind. Ct. App. 1980) ("A witness's bias, prejudice or ulterior motives are always relevant in that they may discredit him or affect the weight of [the] testimony.")). Therefore, their testimony would not be considered

compelling given their economic motivation for opposing this permit.
Competition between permittees is not a valid reason for denying a permit.

10. Reasonable competition between permittees that results in better products being delivered, better services being offered, diverse shopping environments and lower prices to consumers is good public policy, helps protect and promote economic welfare, and is not inconsistent with the Commission's purpose of regulating and limiting the manufacture, sale, possession and use of alcoholic beverages. IC 7.1-3-19-11.
11. Indiana law does not require an applicant to separate its beer and wine from other goods on Sundays. As such, LB's inquiry on this issue has nothing to do with qualifications for a permit and is not a valid reason for recommending a denial.
12. The LB's recommendation is clearly erroneous as long as there is a lack of substantial evidence that supports it. IC 7.1-3-19-11.
13. The Commission may decline to follow the recommendation of the LB where the recommendation of the LB is not based on substantial evidence. *Id.*
14. The LB denied this application without considering any documentary or other evidence that would support a finding that this permit should not be issued. (LB Hearing).
15. The Commission may reverse the LB's action in denying the application of a permit if it finds that the LB's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. *Id.*
16. The LB's action in denying the application of the permits in these matters was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence.
17. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the Vigo County Local Alcoholic Beverage Board to deny the application # DL84-20757 was not based on sufficient evidence and cannot be sustained. And it is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal

hearing was in favor of the Permittee and against the recommendation of the Vigo County Local Alcoholic Beverage Board. The appeal of Permittee, Casey's Enterprises, LLC, d/b/a Casey's General Store #1864, 3266 N. 25th Street, Terre Haute, Indiana 47804, for the type 115 Alcohol and Tobacco Commission (ATC) permit, #DL84-20757, is GRANTED and the recommendation of the Vigo County Local Alcoholic Beverage Board in this matter is REVERSED.

DATED: February 16, 2005

U-JUNG CHOE, Hearing Judge